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Docket Control
ARIZONA CORPORATION COMMISSION
1200 West Washington Street
Phoenix, Arizona 85007RE: In the Matter of US West Communications, Inc.'s Compliance With §271 of the
Telecommunications Act of 1996, Docket No. T-00000A-97-0238

Dear Sir or Madam:

The Association of Communications Enterprises (ASCENT), in lieu of its participation in the Commission's Performance Assurance Plan (PAP) Backsliding and Penalties collaborative session, submits the attached September 27, 2000 letter to Montana Commissioner and National Association of Regulatory Utility Commission President Bob Rowe for Commission consideration.

ASCENT's letter highlight's concerns associated with the development of a Qwest's PAP and performance penalties, in particular. These concerns are reflected in several of the October 13, 2000 comments in response to Qwest's September 25, 2000 PAP comments (see for example WorldCom, Inc., Eschelon Telecom, Inc., and Electric Lightwave, Inc. *Joint Comments in Response to Qwest's September 25, 2000 Performance Assurance Plan Comments*.) ASCENT urges the Commission to incorporate penalty assessments in its Qwest PAP consistent with ASCENT's recommendations.

Sincerely,

ASSOCIATION OF COMMUNICATIONS ENTERPRISES

Andrew O. Isar

Attachment



Andrew Isar, Director — State Affairs
aisar@millerisar.com

Via Electronic and Regular Mail

27 September 2000

Commissioner Bob Rowe
Montana Public Service Commission
1701 Prospect Avenue
Helena, MT 59620-2601

RE: Qwest Regional Performance Assurance Plan

Dear Commissioner Rowe:

The Association of Communications Enterprises (ASCENT) commends you and your colleagues for pursuing development of a region-wide Qwest post section 271 performance assurance or “anti-backsliding” plan. Clearly, a Qwest performance assurance plan (PAP) will help guarantee that Qwest continues to comply with the 1996 Telecommunications Act’s wholesale obligations, once Qwest obtains its highly prized in-region interLATA market authority. In anticipation of the first PAP collaboratives in October and in light of Qwest recent proposed PAP filing, ASCENT wishes to stress the critical importance of developing a meaningful regional plan that will serve as a strong compliance incentive for Qwest, rather than a “cost of business” for impeding its competitors’ efforts.

On September 22, 2000, Qwest submitted a proposed PAP, which, according to Qwest, has been modeled after the Southwestern Bell Telephone Texas PAP.¹ According to Qwest, the company’s proposed PAP adopts a statistical and payment structure consistent with the Texas PAP. Qwest agrees to make the Plan available in a particular state upon the Federal Communications Commission’s (FCC) approval of that state’s Section 271 application. Although the Texas PAP did indeed receive FCC approval as Qwest touts, Qwest’s proposed plan should not be presumed ideal, nor necessarily acceptable in its current form.

As you know, the FCC in its June Texas 271 Order² drew on its Bell Atlantic-New York’s 271 application experience, when reiterating the elements of an effective PAP that

¹ Letter of R. Steven Davis, Qwest, to Messrs. Steven Center, Maxim Telecom Consulting Group and Frank Darr, National Regulatory Research Institute (September 19, 2000)

² *In the Matter of Application by SBC Communications Inc., Southwestern Bell Telephone Company, And Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the*

fell into a “zone of reasonableness” and would be likely to provide sufficient incentives to foster post-entry checklist compliance. Citing to its Bell Atlantic – New York 271 order, these key elements include: 1) a potential liability that provides a meaningful and significant incentive to comply with the designated performance standards; 2) clearly-articulated, pre-determined measures and standards, which encompass a comprehensive range of carrier-to-carrier performance; 3) a reasonable structure that is designed to detect and sanction poor performance when it occurs; 4) a self-executing mechanism that does not leave the door open unreasonably to litigation and appeal; and 5) reasonable assurances that the reported data is accurate.³ The FCC recognized that state plans would, however, indeed vary.⁴

From an economic perspective, the purpose of a performance assurance plan is to deter Qwest from engaging in anticompetitive behavior and to provide an incentive for reliable performance. These objectives can only be achieved if the magnitude of the financial consequences of discriminatory behavior by Qwest are greater than the expected value of the gains that Qwest will be able to earn through such calculated performance. The FCC noted of the Texas PAP that its penalties “would discourage anti-competitive behavior by setting the damages and penalties at a level above the simple cost of doing business.”⁵ But the proverbial devil is in the details.

The structuring of the penalties is as important as the penalties themselves. Efforts to cap penalties or to otherwise limit penalties on a regional basis, by measure, by period, by type of non-performance, or in any manner that mitigates the effect of Qwest’s non-performance, will dilute what could otherwise appear to be substantial penalties. If substandard or non-performance continues, penalties should increase in their severity for the duration of such performance. And competitors affected by Qwest’s non-performance should be fully indemnified for their related costs, rather than being expected to assume the cost of service-affecting problems caused through no fault of their own, by a non compliant vendor. Qwest should not be allowed to mitigate its liabilities through a series of limiting provisions whose net effect is to render non-performance penalties meaningless.

Telecommunications Act of 1996 To Provide In-Region, InterLATA Services In Texas, CC Docket 00-65, Memorandum Opinion and Order (June 30, 2000) [“Texas 271 Order”], at ¶422 *et seq.*

³ *Bell Atlantic New York Order* 15 FCC Rcd at 4166-67, para. 433.

⁴ “While the details of such mechanisms developed at the state level may vary widely, we believe that we should examine certain key aspects of these plans to determine whether they fall within a zone of reasonableness, and are likely to provide incentives that are sufficient to foster post-entry checklist compliance.” *Ibid.*

⁵ *Ibid.*

Commissioner Bob Rowe
27 September 2000

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We should not be lulled into believing that because Qwest's proposed plan contains the general *elements* found in the FCC approved Texas PAP, that Qwest's plan will accomplish its objectives. ASCENT urges the development of a plan that will provide the necessary incentives for Qwest to meet its market opening obligations, and assurances that competitors will be able to serve their customers reliably when obtaining underlying services, facilities, and interconnection from Qwest.

Sincerely,

Association of Communications Enterprises

/s/ Andrew O. Isar

Andrew O. Isar

Cc: Mr. Robert M. Center, Maxim Consulting Group
Mr. Frank Darr, NRRI

**STATE OF ARIZONA
ARIZONA CORPORATION COMMISSION**

IN THE MATTER OF US WEST)
COMMUNICATIONS, INC.'S)
COMPLIANCE WITH §271 OF THE)
TELECOMMUNICATIONS ACT OF)
1996)

DOCKET NO.
T-00000A-97-0238

OCTOBER 17, 2000

CERTIFICATION

This is to certify that on October 17, 2000, an original and 10 copies of the Association of Communications Enterprises October 17th comments have been sent via overnight delivery to Docket Control, Arizona Corporation Commission, 1200 West Washington Street, Phoenix, Arizona 85007, and copies of the foregoing have been mailed via first class mail, postage prepaid, to:

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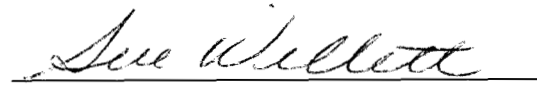
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